No. 15271

In the

United States Court of Appeals

For the Ninth Circuit

OREGON PLYWOOD SALES CORPORATION,

Appellant,

v.

SUTHERLIN PLYWOOD CORPORATION and NORDIC PLYWOOD, INC., *Appellees.*

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

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SUBJECT INDEX

TABLE OF CASES

OTHER AUTHORITIES

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ARGUMENT

I

THE TRIAL COURT ERRED IN FAILING TO FIND AND CONCLUDE THAT SUTHERLIN BREACHED ITS CONTRACT WITH APPELLANT BY FAILING TO CONTINUE IN PRODUCTION AFTER APRIL 21, 1954, AND BY SELLING ITS MILL TO NORDIC ON SEPTEMBER 7, 1954.

A. The contract expressly requires Sutherlin to operate continuously during its term.

B. Even if the contract did not expressly require Sutherlin to operate continuously during its term, the contract, properly interpreted, required continuous operations.

For the convenience of the court the contract involved (Exhibit 1) is set out in the appendix to this brief.

The brief of the appellees indicates that they take the position that the provisions of the output contract do not unambiguously indicate that production is required throughout its entire term (Appellees' Brief p. 28, 31). They urge the Court that the essential term in the contract, which determines Sutherlin's obligation, is the term "output"; that the meaning of this term is to be found in the case law since the contract fails to define it; and that the case law declares that in such an instance the output promisor is not required to have an output if it decides in good faith not to have one. Consequently, appellees say that this Court need only decide whether there is evidence to sustain the trial court's finding of Sutherlin's good faith in closing its mill and later selling it to Nordic. Appellees maintain that if there is, then the output contract was performed.

Of course, it can be readily seen that if the appellees' major premises is erroneous, if the provisions of the contract give meaning to the term "output" and indicate that an output is required, the entire position of the appellees becomes untenable. If the contract requires an output, Sutherlin breached it by closing its mill and later by selling it to Nordic. If Nordic interfered with our contract rights by knowingly preventing performance of the contract, it committed a tort. Therefore, the provisions of the contract which require Sutherlin to remain in production for the term of the contract will again be examined.

As indicated in our opening brief, paragraphs three and four of page three of the contract hold Sutherlin to a standard of performance based on continuous production unless the mortgage is paid in full, even though Sutherlin is unable to produce because of fire, earthquake, disaster or act of God (Appellant's Op. Brief, p. 19-21). In *Great Lakes & St. Lawrence Transportation Co. v. Scranton Coal Co.*, 239 F 603 (CCA 7, 1917) defendant agreed to transport plaintiff's coal on its boats on the Great Lakes. Plaintiff obtained a temporary injunction restraining the sale of defendant's boats. The temporary injunction was affirmed upon appeal to the Court of Appeals for the Seventh Circuit. The contract obligated defendant to transport coal on "all west

bound trips". There was no express provision that defendant's steamers would make any trips whatsoever. Defendant contended that its obligation to carry coal was conditioned solely upon its untrollable willingness to run the boats. The court refused to accept this contention and held that defendant's obligation to carry coal must be fairly interpreted in the light of the context of the contract and the relations of the parties. So interpreted, the court found that the contract carried with it the further implied obligation to run the boats in a reasonable manner continuously during the term of the contract. The court astutely observed that cases of this type cannot be governed by precedent. At p. 607 the court said:

> "Precedent can throw but little light on the sound interpretation of such contracts, especially as to implying unexpressed obligations: each has its own individuality, its own background and surrounding circumstances. Words are only symbols, and at times, even in the most formal agreement, but elliptical expressions of the mutual understanding; the underlying mutual intent, sought by both parties to be clothed in the language used, must be ascertained; text, context, and extrinsic circumstances, including prior negotiations and relations, may be considered to enable the court to view the matter from the standpoint of the parties at the time of making the contract."

Noting that the vis major clause of the contract provided for suspension of defendant's obligations during periods of floods, breaks, accidents, strikes, etc., the court observed that such a provision was unnecessary if defendant's duties were subject only to the owner's arbitrary right to run the vessels. At p. 607 of the opinion the court said:

> "Looking at the agreement in its entirety, we find the circumstances that will suspend the obligation, in whole or in part, of each party, clearly specified, such as strikes, accidents, or the loss of a vessel; it is not the obligation to continue a westbound voyage from Oswego once begun, but the obligation to continue in the conduct of its business, that is expressly remitted or suspended; clearly this has reference to the entire future of the three-year period of the contract; it would be unnecessary to abate the obligation to carry in the event that a vessel be destroyed, if the duty to carry from Oswego were subject to the owner's arbitrary right to keep the vessel on Lake Erie. Futhermore, such a construction would place this part of the plaintiff's business completely at the mercy of the shipowner, inasmuch as plaintiff's obligation is absolute, except for the specified excuses, to give defendant its cargo on call at the port. A bilateral contract of the nature here in question will not lightly be construed, so as to give one of the parties a virtual option, instead of imposing upon each of them obligations conditioned as they may have expressly agreed."

In the present case there would likewise have been no need for the vis major clause in paragraph four on

page three of the contract if Sutherlin was free to discontinue operation whenever it determined to do so.

The argument of appellees concerning the meaning of paragraph four is not very clear (Appellees' Brief, p. 33). But apparently appellees contend that paragraph four means merely that the contract is to remain in full force and effect, that is, it is not to be discharged as a matter of law, in situations where Sutherlin is unable to produce because of fire, earthquake, disaster, or act of God. But this interpretation makes no sense at all when it is compared with the appellees' interpretation of the contract as a whole. Appellees say that the contract, interpreted as a whole, does not require Sutherlin to produce, if in good faith it does not or chooses not to produce, and that Sutherlin is obligated to sell the appellant only 80 per cent of the output which it in good faith produces. What better example of good faith for not producing could be offered than a failure to produce because of fire, earthquake, disaster or act of God? In such situations, Sutherlin would be performing the contract according to the appellees' interpretation of it. Then why would the contract contain a provision that it is not to terminate as a matter of law in such situations? A provision is novel indeed when it says that a contract is not to terminate as a matter of law in situations where in fact and in law the con-

tract is being fully performed. It is clear that the appellees did not explain the meaning of paragraph four on page three, but instead read it out of the contract. The reason for this failure is plain. That paragraph cannot be explained consistently with appellees' interpretation of the contract as a whole.

In 3 *Corbin on Contracts*, p. 200 § 568 the following appears:

> "One who contracts to buy all of his requirements of a specified article from another will under some circumstances be held to have promised by implication to keep his business going so that there will be such requirements."

At 3 *Corbin on Contracts* 200 § 568 the following is found:

> "In any commercial agreement in which the compensation promise by one to the other is a percentage of profits or receipts, or is a royalty on goods sold, manufactured or mined, there will nearly always be found an implied promise of diligent and careful performance in good faith and of forbearance to make performance impossible by going out of business or otherwise."

As authority for the foregoing the author says in footnote 78 on p. 200:

> "See Diamond Alkali Co. v. P. C. Tomson & Co., 35 F 2d 117 (CCA 3d, 1929) where the plaintiff,

> a manufacturer of caustic soda, lent $100,000 to the defendant for the erection of a factory in which caustic soda would be used, the defendant promising to buy it exclusively of the plaintiff for five years. It was held to be a breach of contract for the defendant to sell its business on terms that would prevent it from having any requirements of caustic soda; it had promised more than mere repayment of the loan."

Appellees' Brief says nothing concerning our interpretation of the fourth paragraph on page two. That paragraph provides for a deferment of the mortgage payments in the event that Sutherlin does not operate because the appellant does not furnish enough orders to enable Sutherlin "to dispose of 80% of the product of said mill." The mortgage payments are then to resume when orders are furnished sufficient to permit Sutherlin to operate for a period of two weeks. However, the appellees' interpretation of the contract as a whole makes the latter provision merely a signal to resume payments on the mortgage, for appellees must, of necessity, maintain that Sutherlin could refuse to honor such orders. Consider the case where Sutherlin had ceased operations because the appellant failed to submit orders, the mortgage payments had stopped, and then appellant furnished orders enabling a continuous operation for two weeks. If Sutherlin was free

not to operate when it chose not to do so, why would resumption of payment on the abated mortgage have been conditioned on the submission of orders which Sutherlin was not obligated to fill and which the parties contemplated would not be filled? Unless the appellant's orders were to have been filled in such a case, the act of submitting orders would be meaningless in terms of the normal implications of human behavior. But the submission of orders which can be and are going to be disregarded to signify that mortgage payments are to resume is too bizarre for serious consideration. The parties contemplated that the mortgage was to be paid as a result of the operation of the mill and must have contemplated that operation would resume when orders were received. Thus, there is another important provision of the contract which does not square with appellees' interpretation of it.

Paragraph four on page two refers to "80% of the product of said mill". We submit that the provision in paragraph one of the contract referring to "80% of the output of Party of the First Part when Party of the First Part gets into production" means "80% of the product of said mill" as the parties expressed it in paragraph four on page two of the contract. "Output" as used by the parties meant the product of Sutherlin's mill. Appellees say in their brief on page 22 that

Wells v. Alexandre, 130 NY 642, 29 NE 142, has been distinguished as an "exceptional case". What the cases actually say is that *Wells v. Alexandre* involved an *exceptional contract* where the requirements were not the defendant's requirements of coal but were the requirements of certain named steamers. *Edison Electric Illuminating Co. v. Thacher*, 229 NY 172, 128 NE 124; *William C. Atwater & Co. v. Terminal Coal Corp.*, 32 F. Supp. 178 (D. C. Mass. 1940). We submit that what the parties contemplated in the present case by the term output was the product of Sutherlin's mill. The parties so indicated by their reference in paragraph four on page two to the "product of said mill".

Paragraph three on page two is yet another provision discussed in our brief which appellees did not satisfactorily explain. Standing alone and unqualified it says:

> "Party of the Second Part covenants to use its best effort to maintain with Party of the First Part a thirty days' order file at the mill."

Of course, it is elementary that where one party to a contract is required to perform his obligations thereunder, the other party must do likewise. According to appellees' interpretation of the contract, Sutherlin would perform its obligations if it in good faith chose

not to have an output for a considerable period of time. Since Sutherlin would be performing in such a case, the appellant would be required to maintain a thirty-day order file which it knew would not be filled, remaining obligated to its customers for the orders in the interim. May we suggest that such an interpretation was not what the parties meant or intended, especially when paragraph two of page one of the contract requires Sutherlin to ship our orders within a reasonable time.

Especially important is the fact that appellant's obligations clearly ran for the term of the contract. Appellant was required, *for the term of the contract,* to finance green veneer purchases, to provide accounts receivable financing, to promote sales and furnish orders, and to extend a loan of $80,000 repayable over the term of the contract. Surely the provisions of the contract indicate that Sutherlin was likewise bound to perform for the term of the contract.

Instead of interpreting the output contract in accordance with the provisions which it contains, appellees digress to the separate loan contract and refer to a provision which gives the appellant the option to declare the balance of the unpaid mortgage due and payable in case Sutherlin does not accept orders up to 80 per cent of its *capacity*. The meaning of this pro-

vision is plain, but appellees go too far, we think, when they suggest that the appellant's only remedy under the output contract for unfilled orders is this provision which is found in a separate contract.

The provision is informative of the parties intended meaning of the term "output" since they referred in the separate agreement to "80% of capacity", again implying that Sutherlin was expected to continue in business and have an output.

Thus, it is apparent that the appellees' interpretation of the output contract totally ignores a considerable part of its provisions. They offer nothing as to the vis major clause, the provision for abatement and resumption of the mortgage payments, the reference to "80% of the product of said mill" synonymously with 80% of Sutherlin's output, and the paragraph requiring the appellant to use its best efforts to maintain a thirty-day order file coupled with the provision that Sutherlin promised to ship appellant's orders within a reasonable time. There is no doubt what the contract means. Interpreted as a whole, as it must be, Sutherlin was obligated to a standard of performance based on continuous production. From this, as we have shown the rest of appellant's case follows, and the larger part of appellees' brief becomes immaterial.

B. Even if the terms of the contract did not expressly require Sutherlin to remain in business, continue to produce and refrain from disabling itself from performance by selling its mill, such intention should be implied. The rules, announced in *Diamond Alkali Co. v. P. C. Tomson & Co.*, 35 F 2d 117 and *Texas Industries v. Brown*, 218 F 2d 510, are applicable to this case.

Appellees say at page 20 of their brief that the fourfold classification of cases appearing in our opening brief is ours and not Williston's, and then quote partially from the author's treatise. In the discussion commencing at 1 *Willston on Contracts*, Rev. Ed. 353 § 104A, the author groups the cases into three broad categories, the third of which actually consists of two categories. One requires good faith production (our second pattern of cases) and the other requires the promisor to maintain his business or plant as a going concern (our fourth pattern of cases). The entire discussion by Williston is set forth in the appendix to this brief.

An extensive quote from 3 *Corbin on Contracts* 204 appears at p. 30 of appellees' brief concerning the matter of leaving gaps unfilled by construction. Appellees should also have quoted the language on p. 207 of volume three to the effect that output contracts "very frequently do not justify the inference of a promise to carry on production" (implying, of course, that they may

justify such inference), and from footnote 23 on page 509 of volume one where the author says that "in some cases, the court has found an implied promise to remain in business during the specific period."

At page 28 of appelles' brief they say that "the best effort" provision furnishes no conceivable standard of performance, hence, it is too uncertain to be enforceable. They cite *First Natl. Bank v. Klock Produce Co.* (1917) 85 Or. 403, 166 Pac. 955 and *Barton v. Spinning* (1894) 8 Wash. 458, 36 Pac. 439. But those cases are not in point. It seems well established that a promise to use reasonable efforts or best efforts is sufficient consideration. In *Wood v. Lucy, Lady Duff-Gordon* 222 NY 88, 118 N.E. 214, 118 NE 1082, such a promise was not expressly contained in the contract, but was implied by the court and held to be a sufficient consideration.

It was expressly provided in the contract in this case that appellant should use its best efforts to promote sales. We say it was implied that Sutherlin would use its best efforts to supply the product for the sales.

Appellees register surprise (Appellees' Brief p. 21) concerning our statement that the rules expressed in the fourth pattern of case law do not apply here. The reason for this statement appears on pages 26 and 27 of our opening brief. It is that the terms of the contract clearly require continuous production, and con-

sequently there is no need to resort to the case law to determine whether such obligation should be implied.

Appellees' Cases.

Appellees appear to rely principally upon the following three cases: *In re United Cigar Stores Co.*, 8 Fed Supp 243, affd. 72 F. 2d 673 cert. den. sub. nom. *Consolidated Dairy Products Company, Inc. v. Irving Trust Co.*, 293 U.S. 617, 79 L. Ed. 706, and *William S. Gray & Co. v. Western Borax Co.* (CCA 9, 1938) 99 F 2d 239.

In *Re United Cigar Stores Co., supra*, the requirements promisee became a voluntary bankrupt. A claim was filed for damages resulting from the failure of the bankrupt to have further requirements. The case stands only for proposition that under the particular facts involved the court found no implied agreement that the bankrupt would continue in business and have requirements for the term of the contract. In that case the court found that there were no provisions in the contract which indicated that the buyer was to remain in business and have requirements. It was claimed that a provision in the contract requiring claimant to sell 15,000 shares of stock of the bankrupt at one-half of the market price was such an indication. But the court found that such a provision was not sufficient and that it was intended to stimulate the purchases of ice cream by the bankrupt by giving it an interest in claimant's business.

United Cigar Stores Co. is not inconsistent with appellant's position. The court there clearly recognized the rule which we contend is applicable here. The court said at p. 245:

> "Other provisions of the requirements contract may be strong enough to indicate an agreement that the buyer was to remain in business and continue to have requirements. Diamond Alkali Co. v. P. C. Tomson & Co., 35 F 2d 117 (C.C.A. 3); Wiseman v. Dennis, 158 Va. 431, 157 S.E. 716. See, also, the remarks of Kay, L.J., in Hamlyn & Co. v. Wood & Co., supra [1891] 2 Q. B. at page 495."

The court in *United Cigar Stores Co.* thus recognized the rule of *Diamond Alkali Co.* that the provisions of the contract may indicate that the parties intended that the buyer was to remain in business and continue to have requirements. It merely found that the only provision in that case suggesting such an intention was the stock option and the court thought that provision was intended as an inducement to stimulate purchases of the seller's product. That provision alone was insufficient to show an intention of the parties that United Cigar Co. should remain in business and have requirements. On appeal the court of appeals for the Second Circuit also recognized the rule which we contend is applicable. In *Re United Cigar Stores Co.*, 72 F. 2d 673 at page 675 of the opinion the court said:

> "In some cases emphasis has been placed upon a supposedly implied obligation of the buyer to continue to have requirements in substantially the same amount throughout the contract period (Chalmers & Williams v. Walter Bledsoe & Co., 218 Ill. App. 363), or at least to continue in business for that period and have all the requirements resulting from such continuance [Hickey v. O'Brien, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227; Diamond Alkali Co. v. P. C. Tomson & Co. (C.C.A.) 35 F. (2d) 117; Great Lakes & St. L. T. Co. v. Scranton Coal Co. (C.C.A.) 239 F 603]. Wells v. Alexandre, 130 N.Y. 642, 29 N. E. 142, 15 L.R.A. 218, is often cited to this effect though it really involved the purchase and sale of an amount of coal which was to be measured not by the requirements of the buyer but by the requirements of certain named steamers. Although the defendant sold the steamers, they continued to have requirements which were held to fix the amount of coal the defendant had agreed to buy."

At p. 14 of their brief appellees discuss *H. M. Pfann & Co. v. J. C. Turner Cypress Lumber Co.*, (CCA 5, 1912) 194 Fed. 69, cert. den. 225, U. S. 706, 56 L Ed 1266 (1912). In that case there was an ordinary agreement to buy and sell such lumber as might be manufactured by defendants. In consideration for an extension of the contract for two years plaintiff loaned defendant $6,000.00. The case merely holds that under the circumstances of that case the parties did not intend that the defendant was required to manufacture any particular quantity of lumber.

Appellees rely heavily upon the case of *William S. Gray & Co. v. Western Borax Co., supra.* In that case defendant granted plaintiff an exclusive sales agency for the sale of its products for a period of 10 years. It was not an output or requirements contract. In that case there were no provisions such as those in the contract here involved which indicated that performance was to continue for the term of the contract. Of importance to the decision in that case was a provision in the contract that if and when the producer's net return fell below $20.00 per ton at his plant, commissions on goods netting less than $20.00 per ton at the plant would be subject to reconsideration and further mutual agreement. The court said at p. 242 of the opinion:

> "Certainly the possibility (and, indeed, as proved by subsequent events, the actuality) that goods might net at the plant less than $20 per ton and that the parties might be unable to agree upon what commissions should be paid on such sales, also negatives the implication of an unrestricted promise by the appellee to retain its properties and to continue to produce from them."

Defendants business declined and shortly after the National Bank Moratorium it sold its properties in June 1933. In view of the provision for reconsideration of the commissions when the price fell below $20, the court

found that plaintiff could not establish its expected profits.

In the *William S. Gray* case the court undoubtedly believed that the general economic crisis of 1933 was not contemplated by the parties. In 18 *Cornell Law Quarterly* 269, 274, the author said:

> "A general economic crisis, or a wholly unexpected collapse of the market for the vendee's particular product, would seemingly justify his withdrawal from business. It does not follow, however, that unprofitable operations due merely to his own lack of wisdom in entering into the contract would constitute such an excuse."

Appellees attempt at pp. 23-25 of their brief to distinguish *Diamond Alkali Co. v. P. C. Tomson Co.*, 35 F. 2d 117. They say that the court there "discerned an intention of the parties that the buyer's requirements would *continue* to be as great as in its *already existing business*," and contend that the case has no application here because Sutherlin's was a new business. But there is no such statement in that case. The quantity of defendants requirements was not mentioned. The question was "whether or not under the terms of this contract there was an obligation on the part of the defendant to continue in business for five years and buy its supplies from the plaintiff during this time." It was held that such an obligation was implied.

Appellees then say that the case was rejected in favor of applicable local law in *Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp.* 130 F. 2d 471, 473. But it is apparent that the facts in the latter case made the rule of *Diamond Alkali* inapplicable. The demand for defendant's product fell off, labor trouble developed and there was a marked reduction of defendant's business in 1937. There were no provisions of the contract which the court found sufficient to justify an obligation to continue in business.

Appellants then contend that here there was no "advantageous sale" as in *Diamond Alkali.* But in the present case the mill was sold for $660,000.00 when its book value was only $504,974.79 (Ex. 6, 133). Under appellees' theory that Sutherlin was on the verge of financial collapse and bankruptcy, this was not only an "advantageous sale"; it was nothing short of a bonanza.

In attempting to distinguish *Texas Industries v. Brown,* 218 F 2d 510 (CCA-5 1955), appellees say that the case involved a charge of bad faith on the part of the requirements buyer. It is true that the complaint there alleged that the transfer was deliberately arranged pursuant to a scheme to deprive the seller of the benefit of the contract. But the decision was not based on bad faith. The basis of the decision is found in the

sentence in the opinion immediately preceding the quotation from the case set forth in appellees' brief at p. 26. That sentence, found at page 512 of the opinion, is:

> "The written agreement shows on its face that the requirements of the three block plants were the subject matter of the sale, and were within the contemplation of the parties."

So, in this case the output of the Sutherlin mill was the subject matter of the sale. The parties contracted in regard to the product of the mill and the mill has not ceased to operate and have an output. The court held that the provisions of the contract implied a promise "to keep the plants in operation lest, by disposing of them or shutting them down, the buyers be permitted to destroy the subject matter of the contract."

The Oregon cases do not definitely indicate the rule of interpretation followed in Oregon if a contract is silent on the meaning of the term "output" in an output contract. *Otto Seidenberg, Inc. v. Tautfest*, 155 Or 420 64 P 2d 534, indicates that the rule of the third pattern, namely, that output means normal output, was there applied. At p. 20 of their brief appellees quote the following from p. 425 of the opinion:

> "The evidence shows good faith on the part of the grower and the exercise of good husbandry in an effort to produce the maximum amount of hops

> contracted to be sold. The buyer was in no position to reject the hops by reason of the quantity."

The quotation indicates that the standard of performance required of an output seller is something more than good faith, namely, good husbandry. This case insofar as it might possibly be relevant here shows that the obligation of the output seller in an ordinary case is determined by the quantity of goods that *can be* produced in the exercise of good faith and good husbandry. It does not reject the doctrine which we contend is applicable here, namely, that under the particular contract involved Sutherlin was required to continue in business and have production for the term of the contract.

Appellees' position seems to be that all of the output and requirements contract cases follow the rule that the output promisor is never required to continue in business and to have production. It is fortunate that little time need be spent in discovering that the law is otherwise. It is reiterated that if the Court finds that the contract itself does not clearly indicate Sutherlin's obligations thereunder, the present case is not an ordinary one in which the only substantial commitments of the parties were the mutual promise to buy and sell. In addition appellant was obligated to loan Sutherlin

$80,000.00 to be repaid during the term of the contract, to finance green veneer purchases for Sutherlin, interest free, for the term of the contract (at a rate of more than $75,000.00 per month), to advance Sutherlin money against its accounts receivable for the term of the contract and to use its best efforts to promote the sale of Sutherlin's product for the term of the contract. These obligations were assumed by appellant for the entire term of the contract. It could not evade its obligations by going out of business or selling its assets. We submit that it is not reasonable that appellant would have assumed its obligations for the term of the contract while Sutherlin was free to destroy the contract at any time by going out of business or selling its plant. The note at 18 *Cornell Law Quarterly* 269 is particularly instructive. At page 270 of that article the author says:

> "The purpose of such a contract is to enable a buyer to make provision for future needs, subject to fluctuations within reasonable limits about an estimated or reasonably understood figure, which he cannot definitely forecast: not to enable him to secure a source of supplies without obligating himself to take them if it would be more advantageous to dispose of or close down his business. These contracts are usually for long terms and the seller usually allows a preferential rate on his commodity, at the same time taking the risk of non-sale of the surplus. It is difficult, in the absence of an express stipulation which could easily be made, to assume

> that a seller would intentionally enter into such a contract if it were to bind him absolutely, but be terminable with impunity whenever the other party at his personal option decided to go out of business."

In view of the obligations of appellant for the term of the contract it was surely intended by the parties that Sutherlin was required to continue production for the term of the contract and not to intentionally disable itself from further production by selling its mill or shutting it down.

At 3 *Corbin on Contracts* 209 § 570 the following appears:

> "If a contract is such that a certain performance by one party is necessary in order to earn the compensation that has been promised him, and that performance can not be rendered without the active co-operation of the other party, a promise to render such co-operation will usually be implied."

In this case appellant was required to use its best effort to maintain with Sutherlin a thirty days' order file (Ex. 1, Par. 3, Page 2). In other words, appellant was required to use its best efforts to promote the sale of Sutherlin's product. That it did so (R. 83, 85) is undisputed in the testimony. But it could not render such performance without the active cooperation of Sutherlin, that is by Sutherlin's continuing in business and

producing plywood to be sold by appellant. According to Professor Corbin, a promise to render such cooperation—that is to continue in business and produce plywood—is usually implied. We submit that it should be so implied here.

Professor Williston, Professor Corbin and the cases cited by both appellant and appellee agree that the various provisions contained in the contracts may indicate an intention of the parties that continuous operation was contemplated or that the output promisor would not sell its plant or shut it down and thus disable itself from producing further. The cases relied upon by appellees recognize this doctrine, none of them reject it. In some of the cases the court found that there were no provisions in the contract which would make the rule applicable. We contend that this case comes within the rules enunciated in the following cases: *Wells v. Alexandre*, 130 NY 642, 29 NE 142; *Great Lakes & St. Lawrence Transportation Co. v. Scranton Coal Co.* 239 F 603; *Diamond Alkali Co. v. P. C. Tomson & Co.*, 35 F 2d 117; *Texas Industries, Inc. v. Brown*, 218 F. 2d 510; *Central States Power & Light Corp. v. United States Zinc Co.*, 60 F. 2d 832, cert. den. 287 U. S. 660, 77 L. Ed. 570.; *Fayette Kanawha Coal Co. v. Lake & Export Coal Corp.* 91 W. Va. 132, 112 S.E. 222.

Appellees imply at p. 19 of their brief that Judge McDermott in his dissenting opinion in *Central States*

Power & Light Corp. v. United States Zinc Co., supra, disagreed with the rule we contend is applicable. But he merely disagreed with application of the rule to the particular facts in the case and limited his dissent to the situation where the requirements purchaser went out of business. (Note that the majority held that the rule was applicable as well where the promisor went out of business during the term of the contract.) Judge McDermott makes it very clear that the promisor should not be permitted to evade his responsibilities by selling the mill. At p. 836 of the opinion he said:

> "Vendee could not escape its obligation by selling the smelter; as long as the smelter required gas, the obligation remained.

At p. 837 of the opinion he cited several decisions which

> "hold that an agreement to purchase the requirements of a business cannot be evaded by a sale or in other devious ways. With these decisions I am in entire accord."

At p. 838 he said:

> "There are numerous cases where a buyer undertook to escape his obligation by selling a business. But in those cases, the business continued to operate, and the agreement to buy its requirements of course remained undischarged."

Mr. Hofheins testified that prior to the execution of the contract (Ex. 1) Sutherlin advised appellant that it "planned on producing plywood and continuing to produce plywood (R. 73). Mr. Steinbach, Sutherlin's secretary, confirmed that this intention was communicated to appellant. Speaking of the conversation with Mr. Hofheins, Mr. Steinbach testified (R. 115): "We informed him that we hoped to keep in operation. That was the idea of forming the company in the first place, was to produce plywood." We attempted to introduce evidence (R. 115) that Mr. Steinbach had testified unequivocally on his deposition that the intention and understanding of both parties was that the Sutherlin Plywood operation would be continued and that Sutherlin advised appellant that it intended continuous operation. However the court indicated that it assumed that Sutherlin "intended to continue operation at least 50 months" (R. 116) and we understood the court to mean that no further testimony on this point was needed. No attempt was made by appellees to rebut this testimony. Thus the discussions of the parties indicate that continuous operation was intended.

GOOD FAITH IS IMMATERIAL.

The court should determine whether the contract either expressly or impliedly requires Sutherlin to perfrom for the term of the contract and to forbear mak-

ing performance impossible by shutting down or selling its mill: If it was bound for the term of the contract, as appellant was, then the question is merely whether the contract was breached. Sutherlin's good faith or bad faith toward appellant is not material to the question of breach. In any event it is difficult to find any good faith on the part of Sutherlin when it never tried to operate from June to September, 1954 and disabled itself from performance by the sale at a handsome price when the market for its product was at an unprecedented high.

II

THE COURT ERRED IN FAILING TO FIND AND CONCLUDE THAT NORDIC TORTIOUSLY INTERFERED WITH AND INDUCED A BREACH OF APPELLANTS' CONTRACT WITH SUTHERLIN.

A. First appellees say there was no breach. Appellees argument on this point consists of stating the conclusion that Sutherlin was disabled from performing (Appellees' Brief p. 48). Apparently appellees concede that Sutherlin had a duty under the contract to try to operate. Evidence was introduced by appellees to show that at some time Sutherlin tried to obtain financing to continue operations (R. 192). But there is no evidence that any such efforts were made after the strike in the industry in June and the consequent in-

crease in the price of and demand for plywood. If any efforts had been made at that time they would undoubtedly have been successful. As we showed in our opening brief (pp. 38-42) Nordic successfully operated the mill with far less financial backing than Sutherlin had by virtue of its contract with appellant. And Nordic's liabilities were three times as great as Sutherlin's (Appellant's Brief 37).

Appellees say that the methods of operation and financial structure of Nordic were so different from Sutherlin's that the former's performance is no indication of what Sutherlin could have done. The "financial structures" were different in that Nordic had liabilities three times as great as Sutherlin's, had to finance its own green veneer purchases and discount its accounts receivable at the bank. The difference in "financial structures" were all in Sutherlin's favor.

The difference in method of operation if any, does not appear in the record. Appellees imply that there were differences. But the evidence is that Nordic started up the mill in September, 1954 in the condition the mill was when it was obtained from Sutherlin. (R. 232). New machinery was not installed until August 1955 (R. 237). Since appellees prevented Sutherlin from operating by disabling Sutherlin from performing, they should now be foreclosed from asserting that the mill

could not be operated. But in any event, the subsequent operation of the mill showed that it could be successfully operated.

Appellees have not contended and there is no evidence that Nordic had better management than Sutherlin could have obtained. The evidence is that Sutherlin could have had John Adams, President of Nordic, as its manager. He applied for the job as manager of Sutherlin's mill before he made an offer to purchase it (R. 219, 220, 229, 230).

An explanation for the successful operation of the mill does appear in the record. It is that the price and demand for plywood was at an all time high during Nordic's operations (R. 88). Nothing in the record indicates that Sutherlin's operation would not have been equally as successful in the same market conditions. With the financial advantages available to Sutherlin under the contract (raw material and accounts receivable financing) Sutherlin probably would have done even better.

B. Second, appellees say that the contract would not have been performed in the absence of Nordic's purchase. But there is a presumption that contracts will be performed (Prosser on Torts 2d Ed., 725-26) and until the sale was actually consummated Sutherlin was in a position to perform the contract. The sale made

performance impossible. The record fails to show that Sutherlin tried to operate from June, 1954 to the sale in September, 1954. After disabling Sutherlin from performing by the sale of the mill, appellees should be estopped to claim that the contract could not be performed anyway.

C. Third, appellees say that Nordic did not induce Sutherlin's refusal to produce or its decision to sell the mill. Appellant contends that Nordic did induce Sutherlin's refusal to produce by participating in the very act which made Sutherlin's performance impossible, namely the sale of the mill. In June, 1954 Sutherlin's stockholders "authorized its directors to seek, sell or lease said mill, and in early June, 1954, defendant Sutherlin Plywood Corporation decided it would sell or lease said mill, if possible" Finding XVI, R. 57). But there is no evidence that any satisfactory offer was made by anyone other than Nordic. There is no evidence that the mill would have been sold in the absence of Nordic's offer.

It is true we inadvertently failed to include in our opening brief a specification of error that the court erred in entering Finding XVIII that Nordic's offer had been made pursuant to invitations for offers. But we think we clearly raised the issue by objecting (Appellant's Brief, p. 12) to Finding XXVI (R. 60) that Nordic

did not induce Sutherlin to sell the mill, by specifying this same objection in our points to be relied upon on appeal (R. 260) and by specifying as error in our opening brief the failure of the court to find and conclude "that Nordic interfered with appellant's contract rights and induced a breach of appellant's contract (R. 18). Appellees apparently recognized our intention since they argued this point at length in their brief at pp. 49-56.

There is some testimony that Sutherlin invited offers from others and that some offers came uninvited. (R. 129) but nothing appears in the testimony which would tend to show that Sutherlin invited Nordic's offer. It is clear that Nordic did make an offer (R. 129, 130, 218 and 230) and that was the offer which induced the sale. The other offers were unsatisfactory (R. 219, 130). Since Sutherlin made no invitation to Nordic its offer stands tortiously bare.

D. Finally, appelles say that Nordic's conduct was privileged because it was acting in furtherance of its own economic interests. Apparently appellees contend that so long as one acts in his own self interest he is privileged to interfere with another's contract rights. But the authorities cited by appellees at pp. 57-58 of their brief do not say that. In *Prosser on Torts* (1941) 999 the following appears:

> "If he has a present, existing economic interest to protect, such as the ownership or condition of property, or a prior contract of his own, or a financial interest in the affairs of the person persuaded, he is privileged to prevent performance of the contract of another which threatens it * * * But where his interest is merely one of prospective advantage, not yet realized, he has no such privilege. The typical case is that of business competition. The courts have held that the sanctity of the existing contract relation takes precedence over any interest in unrestricted competition, and have enforced as law the ethical precept that one competitor must keep his hands off of the contracts of another."

Nordic contended (R. 41) that it was in "competition wtih plaintiff for the production of said mill."

The correct rule is stated in *Imperial Ice Co. v. Rossier*, 18 Cal, 2d 33, 112 P. 2d 631, 633, as follows:

> "It is well established, however, that a person is not justified in inducing a breach of contract simply because he is in competition with one of the parties to the contract and seeks to further his own economic advantage at the expense of the other".

The same rule is announced in *Restatement of Torts*, Sec. 768. Nordic was promoting no interest other than self-interest when it appropriated appellant's contractual benefits to its own use. It conduct was not privileged and cannot be justified.

III

THE RELIEF REQUESTED IS APPROPRIATE.

A. In our opening brief we suggested that since the evidence is undisputed concerning damages, this court should fix the amount of the damages occurring up to the time of trial and remand the case to the trial court to determine the subsequent damages. However, we believe appellees are correct in their assertion (Appellee's Brief p. 59) that it is not the function of this court to fix the amount of the damages and the trial court should be directed to make appropriate findings concerning damages.

The evidence is undisputed that appellant sustained damage of at least $4,000.00 per month. Appellees do not challenge the sufficiency of the evidence except to say at p. 61 of their brief that since this was a new business there is no certainty that it would continue at any particular level. For authority they cite 5 *Corbin on Contracts* 130 § 1023. But again appellees refer to only that portion of the authors statement which they choose to accept. Professor Corbin's statement is as follows:

> "If the business, the running of which is prevented by the defendant's breach, has not had such a history as to make it possible to prove with reasonable accuracy what its profits have been in fact, the profits prevented are often but not necessarily too uncertain for recovery. If in spite of the breach the

business is subsequently started, its subsequent history may afford sufficient evidence to justify the award of damages."

In this case the business was subsequently started after the breach and Nordic's records (Ex. 6, 133) show what the mill's production and sales were. We do not have to speculate on the production and sales from the mill. We know what they were and the damages claimed are fully supported by the record. Having intentionally disabled Sutherlin from having an output, appellees should be estopped to deny that it would have been substantially what the mill did subsequently produce. The parties contracted with regard to the "product of said mill" (Ex. 1, p. 2, par. 4) and the damages requested are based on said product.

B. Injunctive relief is appropriate.

Appellees say at p. 62 of their brief that we have cited no authority for injunctive relief. But *Phez. Co. v. Salem Fruit Union*, (1922) 103 Or 514, 201 Pac. 222, 205 Pac. 970 is clear authority for injunctive relief (See appellant's brief pp. 53-55). In that case the court said at p. 551:

"* * * Where a stranger wrongfully induces another to commit a breach of contract, or intentionally disables such other from discharging the obligations of his contract, the wrongdoer is liable in

damages, or in a proper case may be enjoined from carrying out his wrongful purposes."

Speaking of the power to enjoin the court said at p. 535:

"The present case is one where the invoking of this power might be peculiarly efficacious."

Appellees now claim for the first time that appellant is barred from equitable relief because of its conduct (appellee's brief pp. 62-63). But these innocuous suggestions were not made below and are not supported by the record. Appellees' only contention in the pre-trial order relating to these matters was that since appellant knew that Sutherlin intended to sell its mill and failed to object it was guilty of laches (R. 36, 41, 42). But the testimony was that Mr. Hofheins opposed a sale or lease if appellant did not get the output (R. 89). Apparently appellees do not make any serious contention that laches applies and since this suit was commenced on November 4, 1954, less than two months after the sale to Nordic, it is obvious that laches has no application.

CONCLUSION

The following provisions of the contract (Ex. 1) express the intention of the parties that Sutherlin would continue in business for the term of the contract and

would not make performance impossible by shutting down its mill or selling it and going out of business:

1. Appellant was bound for the term of the contract to (a) loan $80,000 repayable over the term of the contract, (b) finance veneer purchases for Sutherlin, (c) finance accounts receivable for Sutherlin and (d) promote sales and furnish orders. It is inconceivable that appellant was expected to make these substantial commitments for the term of the contract unless Sutherlin was bound to continue in business and not prevent performance by selling its mill or shutting it down.

Sutherlin expressly agreed to accept and ship appellant's orders within a reasonable time. The parties expressed what they meant by "output" when they referred to "the product of said mill" in paragraph 4, page 2, Ex. 1. The contract related to the product of Sutherlin's mill and not merely to Sutherlin's output if it had one. Continuous production is expressly referred to in paragraph 4, page 2, Ex. 1 and in the discussions of the parties. ~~This~~ the vis major clause indicates that Sutherlin was held to a standard of performance based on continuous operations. Finally, the parties expressly covenanted that the contract was to be in full force and effect for its term for both parties.

Since appellant's obligations ran for the term of the contract and could not be evaded by shutting down or going out of business, it is implied that Sutherlin was

likewise bound. The provisions of the contract, the discussions and relations of the parties all imply an obligation by Sutherlin to continue in business and not to disable itself from performance by selling its mill or shutting it down.

Appellees' contentions that Sutherlin was unable to produce fall far short of establishing impossibility. The record shows that Sutherlin never tried to operate from June, 1954 until it sold the mill in September, 1954. Here was no general economic crisis or lack of market for Sutherlin's product, but the greatest market in history. Nordic proved that operation was feasible without free financing of veneer purchases and accounts receivable. Nordic obtained financing from the bank. In the same market with the same mill plus its other financing from appellant, Sutherlin could have done the same. Sutherlin simply chose to breach its contract and sell its mill. It must now pay appellant the damages caused by the breach. Nordic is liable for its wrongful appropriation of appellant's rights in the product of the mill.

Respectfully submitted,

KOERNER, YOUNG, McCOLLOCH & DEZENDORF
Herbert H. Anderson
Charles H. Clarke
Attorneys for Appellant.

APPENDIX

The following is Exhibit 1, the sales contract between appellant and Sutherlin. The paragraph and page numbers of the original exhibit, to which reference is made in the briefs, are shown in parenthesis.

This contract made and entered into this 17th day of December, 1953, by and between Sutherlin Plywood Corporation, Party of the First Part, and Oregon Plywood Sales Corporation, Party of the Second Part;

Witnesseth:

(Paragraph two, page one)

In consideration of the benefits to be derived by each party hereto, Party of the First Part gives and grants unto Party of the Second Part the right to purchase up to 80% of the output of Party of the First Part when Party of the First Part gets into production, and Party of the First Part agrees to accept up to 80% and ship Party of the Second Part's orders as specified and within a reasonable time.

It is further agreed should Party of the First Part not sell the remaining 20% of its product in the ordinary course of business, Party of the Second Part shall have the right to purchase said 20% or part thereof not sold as aforesaid.

It is agreed that the price to be paid for the products of Party of the First Part shall be the wholesale jobber's market price from time to time. If for any reason the parties hereto cannot agree as to this price at any given time, then the price shall be determined by taking the average wholesale jobber's price as evidenced by: 1. Invoices; 2. Quotations; 3. Price lists; of the following ten mills:

Associated Plywood Co.
Anacortes Veneer, Inc.
Georgia-Pacific Plywood Co.
Vancouver Plywood Co.
M & M Woodworking Co.
Northwest Door Co.
Evans Products Co.
Columbia Veneer Co.
Clear Fir Sales Co.
Oregon-Washington Plywood Co.

Party of the Second Part covenants to advance to Party of the First Part 80% of mill value on each car promptly upon receipt of invoice and original bill of lading, balance within ten days after arrival of car at destination, all less 2% cash discount. Value of veneer paid for by Party of the Second Part in each car to be deducted from the payment.

Party of the First Part agrees as compensation for services by Party of the Second Part that an additional

5% of the Mill Value of product shall be retained by Party of the Second Part.

Party of the First Part covenants that it will not sell any of its product to other or others at a price lower than the above mentioned wholesale or jobber's price.

(Paragraph three, page two)

Party of the Second Part covenants to use its best effort to maintain with Party of the First Part a thirty days' order file at the Mill.

(Paragraph four, page two)

It is agreed that there is a mortgage on the mill property of the Party of the First Part to Oregon Plywood Corporation, with certain monthly and annual payments to be made, but in the event Party of the Second Part shall not, at any time or times during the term of said mortgage, furnish sufficient orders to Party of the First Part which would enable Party of the First Part to dispose of 80% of the product of said mill, and for such reason said mill does not operate, then during such period or periods the payments stipulated to be made on said mortgage shall be deferred until Party of the Second Part shall have furnished Party of the First Part orders which shall enable Party of the First Part to operate its mill continuously for the period of at least two weeks, whereupon the regular payments

on the mortgage indebtedness shall resume, and the term of said mortgage shall be extended accordingly.

(Paragraph five, page two)

Party of the First Part shall have the right to reject any orders placed with it by Party of the Second Part, provided specifications are not up to production conditions, nor if unprofitable. All orders shall be deemed accepted unless same shall have been rejected and notices of rejection received by Party of the Second Part within forty-eight (48) hours from receipt of order by Party of the First Part.

(Paragraph one, page three)

It is further agreed that any specification not covered by price procedure above mentioned shall be submitted to Party of the First Part for special price or its approval prior to acceptance of order.

It is further agreed that all plywood shall be manufactured, loaded and shipped in accordance with the Douglas Fir Plywood Association standards and the grade marked thereon, and that the shipping weights will not exceed the following weights per thousand surface feet: ¼″ 790 pounds; 5/16″ 950 pounds; ⅜″ 1125 pounds; ½″ 1525 pounds; ⅝″ 1825 pounds; ¾″ 2225 pounds.

(Paragraph three, page three)

This sales contract shall be in full force and effect from the beginning of production by Party of the First Part and continue for at least 50 months [but this agreement shall be extended one month for each $3,000.00 advanced over said $50,000.00. Initialed: R. F. H., M. Wood.]* but under no circumstances shall expire until the mortgage by Party of the First Part to Oregon Plywood Corporation shall be paid in full.

(Paragraph four, page three)

It is understood and agreed that if the Party of the First Part is unable to produce because of fire, earthquake, disaster or act of God, this contract shall continue in full force until the mortgage heretofore mentioned is paid in full.

It is further agreed that Party of the Second Part shall acquire one share of stock in Party of the First Part, and Party of the First Part shall keep a representative of Party of the Second Part upon its Board of Directors until the mortgage given by Party of the First Part to Oregon Plywood Corporation shall be paid in full, at which time said share of stock shall be surrendered to Party of the First Part upon Party of the Second Part being paid the original purchase price therefor.

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*Handwritten.

In witness whereof, this agreement has been signed in duplicate by the duly authorized officers of each corporation, and the seal of each such corporation is attached hereto, the date first hereinabove written.

SUTHERLIN PLYWOOD CORPORATION,
a corporation,

/s/ By MILLARD WOOD, President

OREGON PLYWOOD SALES CORPORATION, a corporation,

/s/ By ROBERT F. HOFHEINS, Secy.-Treas.

WILLISTON ON CONTRACTS (Rev. Ed.) page 353.

§ 104A. Consideration in bilateral "requirement" and "output" contracts.

It was held in an early Minnesota case that a bargain to sell all that the buyer might require or want in his business lacked consideration, as it left the performance optional, though the buyer promised to buy all he should require; but the weight of authority is clearly otherwise, whether the buyer agrees to buy all that he requires or the seller agrees to sell all that he produces, and rightly.

It is not always easy to determine the correct interpretation of contracts of the general type of those last mentioned. Division of the cases into three classes has

been suggested. The first would regard the contract as involving only an obligation to sell to or buy from the promisee all of such goods that the promisor shall produce or shall require, as the case may be, and to sell such goods to or buy them from no one else. On this interpretation though it be assumed that a seller by ceasing to manufacture may relieve himself from any performance and still keep a promise to sell all the goods he manufactures, and similarly a buyer by going out of business may avoid performance while still observing the terms of an agreement to buy all that he requires, these results can be obtained only by doing something which is in itself a legal detriment, namely, the cessation of business. Even a promise to buy or sell only as much as the promisor chooses is a sufficient consideration when coupled with the agreement that whatever the buyer or seller chooses to buy or sell he will buy from or sell to the promisee. To put the matter in another way—the promise of a seller not to manufacture except for the buyer, or the promise of a buyer not to buy except from a particular seller, is clearly a promise to do something detrimental. A few cases seem to admit that though a contract to buy and sell the requirements or output of a particular factory is a valid contract, an agreement which gives the buyer or seller an option to take or to produce no goods is invalid, although he

agrees that if he should buy or produce any goods of the kind in question he would buy them from or sell them to the promisee. These decisions cannot be supported.

Other courts hold that where abstention from dealing is so unreal and so profitless to the promisee that it cannot be presumed to have been contemplated by the parties as a bargaining factor, such a consideration cannot be regarded as sufficient, especially when not expressed in literal terms. And, being reluctant to give one party so wide a power as that suggested in the first class of cases, unless the language of the contract clearly makes it necessary, these courts will rather seek to find what they regard as the more reasonable intention that the seller has agreed to sell and the buyer to take the buyer's normal or ordinary needs, subject to the reasonable variations of a business continuing on substantially the same scale, yet, if the wider power is given, the contract is not without sufficient consideration.

A third class of cases, not wholly inconsistent with the first, finds from the business situation, from the conduct of the parties, and from the startlingly disproportionate burden otherwise cast upon one of them, a promise implied in fact by the seller to continue in good faith production or sales, or on the part of the buyer to maintain his business or plant as a going concern and

to take its bona fide requirements. In other words, this view implies an obligation to carry out the contract in the way anticipated, and not for purposes of speculation to the injury of the other party, but recognizes that either party may in good faith cease to have such output or requirement. Some cases go further and assume that there is an average or contemplated output or requirement which is to be produced or will be needed by the promisor, subject to ordinary fluctuations, and that he will subordinate his own interest as to carrying on his business to the performance of the contract as contemplated.